INTERIOR BOARD OF INDIAN APPEALS

Cougar Oil Company v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

53 IBIA 246 (6/28/2011)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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COUGAR OIL COMPANY, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 09-064
EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 28, 2011

Cougar Oil Company (Appellant) appealed to the Board of Indian Appeals (Board) from a decision by the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA).[1] The Regional Director affirmed a decision by the BIA Osage Agency Superintendent (Superintendent) refusing a request by Appellant for approval of Appellant's use of a road labeled by Appellant as road "A" to access Appellant's oil and gas leasehold property, and instead directing Appellant to use a road (road "B") that originally was designated for access to the leasehold property. We affirm the Decision because Appellant's reiteration of reasons why it believes its use of road A should be approved and Appellant's bare assertion that permission from previous landowners "grandfathered in" Appellant's continued use of the road are insufficient to demonstrate that BIA abused its discretion in denying Appellant's request for BIA approval.

Background

Appellant is the lessee for Osage Oil and Gas Mining Lease No. 14-20-G06-9879, located on land consisting of the Northwest Quarter of Section 4, Township 23 North,

[1] *See* Letter from Regional Director to Appellant, Feb. 9, 2009 (Decision) (copy attached to Appellant's notice of appeal). The copy of the Decision included in BIA's administrative record is date-stamped February 12, 2009, but appears to be an internal copy. The copy provided by Appellant, dated February 9, 2009, shows a handwritten signature of the Regional Director, whereas the copy in the record is not on letterhead and is stamped with the Regional Director's name in the signature block. The body of the text in each is identical.

Range 11 East, Osage County, Oklahoma. It is undisputed that at the time the lease was executed in 1983, a lease access road was established that crossed the Northeast Quarter of Section 4. Appellant labels the access road in Section 4 as road "B." It is also undisputed, at least in this appeal, that at some point in time[2] Appellant began using, with the verbal permission of previous landowners, a road crossing the Southeast Quarter of Section 33, Township 24 North, Range 11 East. Appellant labels the road in Section 33 as road "A."

Osage oil and gas leases are governed by 25 C.F.R. part 226. Section 226.19(a) provides that a "[l]essee . . . shall have the right to use so much of the surface of the land within the Osage Mineral Estate as may be reasonable for operations and marketing" including "the right-of-way for ingress and egress to any point of operations." Section 226.19(a) also provides, however, that if the lessee and the surface owner are unable to agree as to routing, "said routing shall be set by the Superintendent." The regulation contains no criteria for the Superintendent's decision.

In June of 2005, Appellant wrote to the Superintendent asking for BIA's permission to use road A to access its leasehold property. Appellant stated, among other things, that its use of road A was "grandfathered" by agreements with previous landowners, that Appellant had made extensive improvements to the road, that it had used the road for the past 25 years, that others used the road, and that the road is the shortest access road to Appellant's tank battery on the leasehold property. Appellant sought BIA's approval to use road A because the present landowner had complained about Appellant's use of the road.

The Superintendent denied Appellant's request, finding that Appellant had not provided any documentation of agreements with previous landowners, or documentation of Appellant's expenses for improvements to road A. *See* Letter from Superintendent to Appellant, June 22, 2005. The Superintendent decided that because road B was the original route that was set for accessing Appellant's leasehold property, Appellant must use that road. The Superintendent noted that the route could be changed if Appellant and the surface owner could come to agreement, i.e., for Appellant to use road A.

On appeal to the Regional Director, Appellant repeated the reasons for its request to use road A: Appellant had been using the road since the early 1980s, Appellant has a gas separator on the road and plans to sell gas and maintain a line along the road; Verdigris

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[2] Our decision does not depend upon the length of time that Appellant used road A. We assume, for purposes of this appeal, that Appellant used road A from when the lease was approved.

Valley Electric Co. uses the road, "other lease holders" use the road; and the road provides a shorter route to Appellant's tank battery.

The Regional Director affirmed the Superintendent's decision. The Regional Director noted that if a lessee and surface owner are unable to reach agreement, the Superintendent had authority to decide the route. The Regional Director acknowledged Appellant's arguments, but found that Appellant had not produced agreements with landowners to use road A, and that because road B was the route originally established upon issuance of the lease, Appellant must continue to use road B.

Appellant appealed the Regional Director's decision to the Board and filed an opening brief. Appellant argues on appeal that it was granted permission to use road A long ago and that it is a hardship to use road B because road A is nearly level, while road B crosses creeks and hills. Responding to the Regional Director's finding that Appellant had not produced agreements with previous landowners, Appellant contends that it "had verbal agreement[s] with the previous land owners" and that its use of road A "is grandfathered in." Opening Brief at 1. Appellant attaches to its opening brief copies of receipts for road work, and a letter from counsel for the current landowner noting that Appellant had "permissive" use of the road from previous landowners, but that once the current landowner constructed a game fence, Appellant's permissive use would end.

The Regional Director filed an answer brief.[3] Appellant did not file a reply.

Standard of Review

A decision by BIA under the Osage oil and gas leasing regulations regarding an access route to leasehold property involves the exercise of discretion. When a BIA decision involves an exercise of discretion, the Board will not substitute its judgment for that of BIA. *See Spang v. Acting Rocky Mountain Regional Director*, 52 IBIA 143, 148-49 (2010);

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[3] The Board's review of Appellant's opening brief revealed that Appellant did not serve its brief on the Regional Director or the current landowner across whose property road A lies. The Regional Director's answer brief was filed in response to Appellant's notice of appeal, which contained no arguments, but the Regional Director also addressed arguments that Appellant made in its earlier appeal from the Superintendent's decision. Because we affirm the Regional Director's decision, we find it unnecessary to order Appellant to serve his opening brief on the Regional Director and the current landowner, or to provide them with an opportunity to file an answer. As noted in the Superintendent's decision, nothing precludes Appellant from reaching an agreement with the current landowner to use road A.

Wallowing Bull-C'Hair v. Rocky Mountain Regional Director, 49 IBIA 120, 123-24 (2009), and cases cited therein. An appellant has the burden of proof to demonstrate that BIA abused its discretion in making a discretionary decision, or that the decision is not supported by the record. *See Spang*, 52 IBIA at 149.

Discussion

Appellant has not satisfied its burden to demonstrate that BIA abused its discretion in refusing to approve Appellant's use of road A and requiring it to use road B unless Appellant and the surface owner reach agreement on the use of road A. The fact that previous landowners gave verbal permission to Appellant to use road A does not mean that BIA abused its discretion when it required Appellant to use the road originally designated for access when Appellant no longer had permission from the current landowner to use road A. And Appellant fails to provide any legal support for his claim that his use of road A is "grandfathered in."

As noted earlier, Osage oil and gas lessees are authorized "to use so much of the surface of the land within the Osage Mineral Estate as may be reasonable for operations and marketing," which includes a right-of-way for ingress and egress. 25 C.F.R. § 226.19(a). If the lessee and surface owner cannot come to an agreement concerning the lessee's use of the surface for routing, then the Superintendent, who is otherwise not involved in surface use issues, must determine the routing, including routes for egress and ingress. *Id*. The regulations do not provide any standards for the Superintendent to follow in setting the routing and, thus, the matter is committed to her discretion. Therefore, our review of the Regional Director's decision is very limited. *See* 43 C.F.R. § 4.330(b)(2); *Grellner v. Anadarko Area Director*, 35 IBIA 192, 195 (2000). We will determine whether the Regional Director considered Appellant's arguments, whether she explained her reasoning, and whether any material facts relied upon to support the decision are supported by the record. *See generally Imperial County, California v. Acting Phoenix Area Director*, 17 IBIA 271, 273 (1989).

At the time Appellant's oil and gas lease was executed, BIA provided Appellant with access to the leasehold via road B. If Appellant chose to use a different route, i.e., road A, it was then Appellant's responsibility, not BIA's, to secure any necessary approvals to use this alternate route, including the duration of any such approval. In considering Appellant's request, the Regional Director considered Appellant's past use of road A, but concluded that the current landowner's lack of consent, coupled with the designation of road B as the original route set by BIA for Appellant's use, outweighed Appellant's argument. Appellant fails to explain how or why the Regional Director's decision constituted an abuse of

discretion. Simple disagreement with a Regional Director's decision is insufficient to meet the burden of demonstrating an abuse of discretion. *See Wallowing Bull-C'Hair*, 49 IBIA at 124. Moreover, the facts on which the Regional Director relied are supported by the record, and her decision is not unreasonable. Therefore, we cannot find that BIA abused its discretion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's Decision.

I concur:

// original signed	// original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge